

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THE HOMESOURCE, CORP.,	:	Civil Action No.
	:	1:18-cv-11970-JBS-KMW
Plaintiffs,	:	
	:	
vs.	:	
	:	Camden, New Jersey
RETAILER WEB SERVICES, LLC	:	Wednesday, November 28, 2018
and JOHN DOES 1-3,	:	11:03 a.m.
	:	
Defendants.	:	

TRANSCRIPT OF TELEPHONIC DISCOVERY CONFERENCE
BEFORE THE HONORABLE KAREN M. WILLIAMS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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I N D E XRE: PRODUCTION OF IP ADDRESSES:PAGE

Colloquy with Mr. Wagner. 6, 18, 21, 24

Colloquy with Ms. Arena.. . . . 10, 21, 22, 25

Order.. . . . 32

1 (Conference commenced at 11:03 a.m.)

2 THE COURT: We're here, good morning, in the case
3 HomeSource versus Retailer Web Services, Case -- Civil Docket
4 Number 18-11970. We are on the record. Will you please enter
5 your appearances, please?

6 MS. ARENA: Your Honor, my name is Alexis Arena and
7 I represent the plaintiff, The HomeSource Corp.

8 MR. LIPMAN: Good morning, Your Honor. Matthew
9 Lipman, along with William Wagner and Adam Wolek. We
10 represent the defendant in this matter, and I believe that Mr.
11 Wagner will handle the proceedings this morning. Both he and
12 Mr. Wolek are admitted *pro hac vice* to this matter.

13 MR. WAGNER: Your Honor, this is Bill Wagner. We
14 also have on the phone RWS's expert witness, Jennifer Bayuk.
15 Spelled B-A-Y-U-K. Ms. Bayuk is available to answer any of
16 Your Honor's questions about the expert conference. We
17 thought it would be valuable to have her available to answer
18 any of your questions. If you do not want her to participate
19 though, she can drop off.

20 THE COURT: It may be useful to have her on. I'm
21 fine. Is there any objection?

22 MS. ARENA: Your Honor, we can proceed, but just
23 with the understanding that I didn't know she would be on
24 before this morning and, therefore, did not have our expert
25 on.

1 THE COURT: Okay. Do you want to get your expert on?

2 MS. ARENA: I don't think there's a need for either
3 expert to be on. And I don't think there's a question here
4 that's relevant that I couldn't answer today based on my
5 extensive conversations with the expert and the client.

6 THE COURT: All right. So, you know, you're all
7 going to have to explain your positions to me a little bit
8 better. Let me start though by saying, if I understand the
9 issue that's ripe for me to address during this call, it's the
10 issue of the production of the IP addresses from defendants.

11 MS. ARENA: Yes, Your Honor.

12 THE COURT: We have had two prior phone conferences
13 on this. The parties, in accordance with plaintiff's document
14 number 30 have had numerous exchanges about this, yet there
15 seems to be some question remaining about what the defendant
16 is supposed to produce and when. I say all that so that you
17 all understand where I'm coming from and why we're on the
18 record.

19 As soon as I see these kinds of disputes about who
20 said what when, we're no long going to do informal
21 conferences, because counsel have now indicated to me that
22 that's not appropriate and we're going to have to put you on
23 the record so that we have a record of what's being said.

24 Let me hear from Mr. Wagner as to why these IP
25 addresses have still not yet been produced.

1 MR. WAGNER: Yes, Your Honor.

2 Your Honor, during our last conference, we took Your
3 Honor's instruction to have the experts work together and
4 decide how the evidence would be produced and analyzed. It's
5 not simply just producing RWS's IP addresses, it's running
6 those addresses against the HomeSource logs of their Websites
7 and the people that were trying to access those Websites.
8 There should be a log listing the computer addresses, the IP
9 addresses for the folks who were trying to access those
10 Websites.

11 And we have expressed concerns that HomeSource would
12 manipulate its data if it was not a simultaneous production.
13 And when we all were together, you said, you know, I envision
14 this as both experts talking to each other in a room or on a
15 phone and working out not only how the production would be
16 made, but how the analysis would be done. And we arranged
17 that conference for November 14 and the experts participated
18 in that conference for an hour-and-a-half.

19 We, RWS, gave the list of the IP addresses to our
20 expert, Jennifer Bayuk, the day before that conference took
21 place. We expected to have a discussion that day about how
22 those addresses would be compared to the HomeSource logs.

23 Once you take a step back and you look at a forensic
24 investigation, the first thing that you have to do is look at
25 the logs of the company that was attacked. HomeSource -- we

1 asked for the logs and had an agreement that HomeSource would
2 produce those logs two days after it filed its amended
3 complaint. They filed their amended complaint on September 4.
4 We had an agreement on September 6 that they would produce
5 their information of the attacks. On September 7 they
6 reneged. And we expected to work through this process where
7 our expert and their expert would get together to decide what
8 information has to be exchanged and actually do the analysis.

9 If you look at HomeSource's Exhibit A, it's at
10 Docket 30-1, on page 12 of the 15 page attachment there's an
11 email at the bottom that says -- it's from counsel for
12 HomeSource to Mr. Wolek. The second paragraph says:

13 "We will bring the IP logs that will be compared to
14 the RWS IP addresses against those and it will be
15 attorneys' eyes only HomeSource information."

16 If you look at page 11, at the top there's an email
17 again between counsel where it says a HomeSource employee will
18 bring a HomeSource laptop and software to my office and will
19 perform the search at that time. Well, we had designated the
20 IP addresses as attorneys' eyes only and --

21 THE COURT: What's the reason for that designation?

22 MR. WAGNER: The reason is that RWS considers the IP
23 addresses as highly sensitive business information. The
24 release --

25 THE COURT: Why?

1 MR. WAGNER: -- of which would cause significant
2 harm. And -- and if I could explain?

3 THE COURT: Sure.

4 MR. WAGNER: So, the IP addresses, there are
5 approximately 1,100 or more than 1,000 IP addresses. Many of
6 those addresses are registered to RWS, but there are a
7 significant number that are not. They're registered to a data
8 center, they're registered to Amazon Web Services, they're
9 registered to an Internet service provider. And RWS uses
10 those IP addresses -- have use those IP addresses to conduct
11 market research.

12 So, when we had our last meeting, you gave an
13 example of Web crawlers. You know, how does Macy's
14 (indiscernible) price that JCPenney charges for pantyhose?
15 You know, some of those IP addresses relate to our market
16 research. So, if HomeSource employees knew of RWS's IP
17 addresses, they could block those access -- IP addresses from
18 accessing the Websites of their clients.

19 And to put this into perspective, RWS is the largest
20 Website platform used by independent appliance retailers in
21 North America. And HomeSource, by its own complaint, is a
22 direct competitor. They took, according to their complaint,
23 200 of RWS's customers away. If they -- if their employees or
24 their president and CEO is -- who counsel for HomeSource would
25 like to designate to do this search -- got the list of IP

1 addresses, they could block those addresses from being able to
2 conduct market research not just on one Website, but on all
3 those Websites. They all -- the IP addresses can also be
4 scanned for intelligence about the future business plans of
5 RWS and its customers, which is valuable information to a
6 competitor, and RWS keeps its IP addresses private to protect
7 against malicious attacks.

8 The way HomeSource would have to search for these IP
9 addresses from its logs would be to go entry by entry and
10 enter it into an IP lookup tool, and for some of those
11 addresses it will come back Retailer Web Services. And for
12 many of those addresses, it will come to these other sources,
13 either the data center, Amazon Web Services, or an Internet
14 service provider.

15 So, we consider this, especially because the parties
16 are direct competitors, especially because HomeSource's key
17 executives, the persons who would do the search, according to
18 Ms. Arena, are James and Greg White, the CEO and president.
19 There's high animosity between the parties. They claim that
20 RWS caused the attack and they want these executives to do the
21 search.

22 Under the Court's discovery order, which is Docket
23 20, it states that even if this were confidential information,
24 not attorneys' eyes only, confidential material may only be
25 disclosed to the party executives who are required to

1 participate in decisions with reference to the lawsuit. And
2 that's at section 4(g) in the discovery confidentiality order.
3 It says nothing about their executives acting as investigators
4 to do the search.

5 And according to counsel for HomeSource, she
6 envisions that HomeSource's president and CEO would walk into
7 our office with a laptop of the logs of their data and would
8 then take our list of IP addresses, put those into the laptop
9 computer and compare the two. If that process occurs, the
10 HomeSource employees will have a copy of RWS's IP addresses,
11 which we believe is protected as attorneys' eyes only
12 material, certainly confidential, and that is not what this
13 part of the discovery confidentiality order would allow.

14 There is nothing in there about allowing your direct
15 competitors to act as investigators and to perform the search
16 and then, at the end of that search, have a copy of all those
17 IP addresses on a HomeSource laptop or to have that
18 information to then go back and block all of our Websites. Or
19 all of our IP addresses.

20 THE COURT: Okay. I understand.

21 Mr. -- I'm sorry. Ms. Arena?

22 MS. ARENA: Yes.

23 THE COURT: What's your response to that?

24 MS. ARENA: Well, he mentioned a couple things, so I
25 guess I'll go through them and respond one by one.

1 He is focused first on the cyber attacks, these DDoS
2 attacks, but just to be clear, that's not the only claim that
3 we have. That's not the only issue to investigate in discovery
4 in this litigation. Another claim is that RWS employees may
5 have posed as HomeSource customers using fake identities to
6 gain confidential and propriety information of HomeSource and
7 engage in unfair competition. So, they have admitted now in
8 discovery that one of their sales employees used a fake name
9 and identity and called HomeSource posing as a HomeSource
10 customer.

11 So, when we go through these logs of who did what in
12 HomeSource's system and we search for RWS's work IP addresses
13 against those logs, it's possible that we'll find that RWS
14 employees are logging in using fake identities, fake names,
15 posing as HomeSource customers, doing things they shouldn't be
16 doing in the system. And I don't know if that's what he's
17 referring to as market research here, but we're certainly
18 entitled to discovery to find out if that's what's happened.

19 So, their proposal, from what I understand, is that
20 HomeSource doesn't ever find (indiscernible) IPs, is not
21 involved at all, doesn't know what RWS did at any time in
22 their system. The experts get together, they get a subset of
23 the data that RWS's expert is trying to limit, and they search
24 it and maybe they'll find that RWS committed these cyber
25 attacks, because maybe they haven't given us the IP that was

1 used to do it. That's just not sufficient. That's trying to
2 prevent us from determining whether or not unlawful behavior
3 occurred.

4 What we want to do is take our logs of all Websites,
5 all data -- these are terabytes and terabytes of data, tons of
6 irrelevant information. There's maybe hundreds of customers'
7 Websites and every time someone or anything -- even, like, an
8 automated bot -- goes to that Website, visits it, there should
9 be, like, a log entry, a request was made of the Website with
10 an IP, the Website, the date and time. We don't have any way
11 of sorting through this easily, separating the good traffic
12 from the bad that easily. That's not something that's been
13 done.

14 But we've -- I am trying to work with them, believe
15 it or not. I have proposed that, you know, their expert can
16 come to my office, their expert can come somewhere else that's
17 convenient, we could do a screen share for their expert's
18 convenience. We can all sit in the room. We will preserve
19 our data fully. I've sent out -- I've taken all the measures
20 that I can think of to take to preserve data. I've sent out
21 the litigation hold notice. We've both sent out preservation
22 letters. I've asked them to back up their data repeatedly and
23 save it and store it.

24 So, this whole argument that we don't have to
25 produce discovery because you might manipulate evidence, I

1 mean, that's not a reason to not produce discovery. That's a
2 -- that's a --

3 THE COURT: Well, that's not the reason that I'm
4 hearing. The reason I'm hearing is -- and that's why I asked
5 him why is this attorneys' eyes only.

6 MS. ARENA: Mm-hmm.

7 THE COURT: And their argument, which is at this
8 point compelling, is the individuals that you have going
9 through the IP addresses are the executive decision makers.
10 There's something innately --

11 MS. ARENA: Well, let me respond to that. Let me
12 respond to that. I am very flexible on who does that. The
13 only reason that I said the executive decision makers was --
14 was because that's what they wanted in the protective order.
15 So, they said we don't want them to be public, we want them to
16 be attorneys' eyes only. And I said, well, I'll agree to a
17 confidential designation. And they said, well, you can't have
18 any executives or HomeSource employees look at it under the
19 confidential designation. And I said, well, wait. How
20 confidential is defined, the executives can look at it.

21 So, that's why I selected the executives, but it
22 doesn't have to be the executives, it could be anybody else at
23 the company. The thing that -- that I --

24 THE COURT: Why can't it -- no. Why are you not
25 answering why it cannot -- why it's inappropriate to be

1 attorneys' eyes only? That's the --

2 MS. ARENA: Okay. Yes. The --

3 THE COURT: -- the question.

4 MS. ARENA: Yeah, I'm sorry. That's what -- I was
5 trying to get there.

6 And so the thing about an IP address is you can
7 change it tomorrow. They cost pennies. They just get a new
8 one. Apparently, RWS is also an ISP and it's got thousands of
9 IP addresses. So, it -- all of his arguments as to why it's
10 AEO are HomeSource can't block us in the future, HomeSource
11 can't know what we're doing in the future. They can just
12 change all of their IPs tomorrow. All we care about is what
13 happened in the past on our Websites.

14 THE COURT: All right. Here's what I just -- maybe
15 I'm not maybe as savvy enough, I'm not sure what's happening
16 with my understanding of this. I'm going back to what I
17 thought would happen.

18 MS. ARENA: Mm-hmm.

19 THE COURT: Plaintiff's expert would show up --

20 MS. ARENA: Mm-hmm.

21 THE COURT: -- with the log of who improperly
22 accessed, --

23 MS. ARENA: Mm-hmm.

24 THE COURT: -- defendant's expert would show up with
25 its list of IP addresses --

1 MS. ARENA: Yes.

2 THE COURT: -- and the two experts would compare and
3 analyze the information. I don't know why that can't happen.

4 MS. ARENA: That can happen, except that the logs
5 are so large, and they're HomeSource's, and they're in binary
6 raw format, they're not files.

7 THE COURT: Someone has to do it. Someone has to do
8 it.

9 MS. ARENA: Well, --

10 THE COURT: HomeSource has to do it.

11 MS. ARENA: Agreed. So -- so, the solution is we
12 have a HomeSource employee there, too, to assist the experts
13 in doing it. And that's what I've been asking for.

14 THE COURT: Why would the expert need -- let me tell
15 you something. We have cases in this courthouse -- and I
16 don't know if you've heard about this -- I won't say the name
17 of them -- but these companies who people go after folks who
18 are improperly accessing their proprietary information,
19 downloading -- I guess the most generic thing is downloading a
20 movie without --

21 MS. ARENA: Yes.

22 THE COURT: -- without access.

23 MS. ARENA: Yes.

24 THE COURT: Right?

25 MS. ARENA: Very familiar with those cases. The --

1 THE COURT: Okay.

2 MS. ARENA: -- John Doe.

3 THE COURT: It's not a big deal. It's not a big
4 deal for the experts to do that. And we're talking about --
5 and, you know, cases that far exceed what we're talking about
6 here.

7 MS. ARENA: So, Your Honor, I -- there -- this is
8 not that case. This is not that -- that type of situation,
9 because what we are comparing RWS's IP addresses against is
10 like a warehouse of documents. Like, if it was in paper, it
11 would take up a city block. And most of that paper is private
12 third-party data that's completely irrelevant to this case.
13 So, we can't give them our city block of paper --

14 THE COURT: You're telling me the experts can't
15 devise an algorithm to run one set of IP addresses against
16 another in, like, minutes? You're telling me --

17 MS. ARENA: They can.

18 THE COURT: You're --

19 MS. ARENA: They can, but what they're asking us to
20 do is give us their city block of paper to use -- to do with
21 it what they will and that's what we're saying we're not going
22 to do. You can come in and inspect, you can be involved in
23 the process, we'll listen to all your concerns about
24 fabrication of evidence and preservation evidence and -- and
25 manipulation of data, we'll hear you on all that, we -- we --

1 we don't want to fabricate data or manipulate data. However,
2 we're not going to turn over all this private third-party
3 material to you, because we can't do that.

4 THE COURT: And they're not --

5 MS. ARENA: And we --

6 THE COURT: -- turning over theirs to you. That's
7 why we have experts involved. The experts, as experts --
8 right?

9 MS. ARENA: Right.

10 THE COURT: They -- I hope they have agreements with
11 your experts about their utilization of this proprietary
12 information. Right?

13 MS. ARENA: Well, our expert --

14 THE COURT: And --

15 MS. ARENA: -- doesn't have it yet. Neither of the
16 -- and I don't have it yet. No one has it yet, except for
17 HomeSource.

18 THE COURT: All right. I'm going to go back to what
19 I -- what I need to ask. HomeSource experts show up with its
20 list, RWS experts show up with its list, the experts talk
21 about how they're going to do the match, and then the match is
22 done and out comes a list of matches or not. That list then --
23 so, that's all you all want is the ultimate matches.

24 MS. ARENA: But, Your Honor, we don't have a list to
25 give them though. We have, like, a warehouse of paper. So,

1 how do we -- we can't even get that to them.

2 THE COURT: How -- so, how do you plan on getting
3 their IP addresses and figuring out if any of their IP
4 addresses hit your information?

5 MS. ARENA: You have both experts come with the list
6 of RWS IP addresses and sit there and use software, as you've
7 discussed, to compare it against the system, but they're not
8 taking home a copy of the system with them.

9 THE COURT: No. The only thing anybody gets at the
10 end of the day are the matches.

11 MS. ARENA: Correct. Yeah, we agree with that.
12 They just don't want to either give us the IP addresses,
13 because they -- once you run it against the system, some
14 HomeSource employee will have some copy of their IP addresses
15 in the logs and they're making this -- what -- what I -- I'm
16 sorry -- is a ridiculous argument about IP addresses being
17 AEO, because it -- it -- they -- they say, they've admitted
18 they're using masked IP addresses to go in our system.

19 THE COURT: Well, wait, and I'm not dealing with
20 that right now.

21 MS. ARENA: Okay.

22 THE COURT: Why can't that be done? Who do you need
23 a copy of it, Mr. Wagner?

24 MR. WAGNER: Your Honor, there are a couple reasons.
25 One, we asked for -- if you look at our letter, it's document

1 31, Docket 31, on page 3 the experts spoke about this for an
2 hour-and-a-half and at the end of that conference they said
3 that they need three sets of data. They need all of those IP
4 addresses, and then they need a subset of data deemed to be
5 evidence of malicious activity, and they need a representative
6 sample of the data that's just benign activity.

7 So they have other -- in their complaint, they said
8 that there were specifically two DDoS attacks and a hacking
9 attempt, so I just want to talk about the DDoS attacks right
10 now. They said that they're -- they had normal traffic, which
11 we're calling benign traffic, and then they had malicious
12 traffic where someone was wasting their resources. And when
13 you look at the attachment that we submitted with our
14 documents, it's a guide to DDoS attacks.

15 This multistate agency identifies ten different
16 types of DDoS attacks and that they occur through different
17 means and you can't just say, well, you're -- you're an IP
18 address that's on their list, therefore you caused the attack.
19 No, you have to go back -- if you look at that document that
20 we provided, Docket 31, on page -- let me just grab it. On
21 page 9 it says:

22 "While the main purpose behind a DDoS attack is
23 malicious consumption of resources, different attacks --
24 attackers may use different techniques to generate
25 traffic necessary for an effective DDoS."

1 And if you look at page 10, under the
2 recommendations it says: "To identify a SYN Flood," -- which
3 is a type of DDoS -- you investigate the network logs and you
4 locate the TCP SYN flag and then you go on from there.

5 On page 12, a UDP Flood. To identify a UDP Flood,
6 you investigate the network logs and look for a large amount --
7 large number of inbound UDP packets.

8 And then page 14 it says to identify an ICMP Flood,
9 you investigate network logs and look for a significant amount
10 of inbound ICMP traffic from a large number of sources.

11 And I won't go through all of them, but there's
12 another one that says, on page 17, to identify a NTP
13 Reflection Attack with an amplification, and you investigate
14 your network logs and look for inbound traffic with a source
15 port of 123/UDP.

16 So, as you go through this document, it also says
17 that you have to look at the source port. You know, it's not
18 just that you have someone entering in on your Website that
19 will cause a DDoS attack, you know they have to be using your
20 resource in an inappropriate manner. The Websites are set up
21 so that they get multiple hits during the day. You're going
22 to have a lot of benign traffic.

23 But what HomeSource is saying is that there was a
24 DDoS attack, that there was actually malicious traffic that
25 negatively impacted the ability of their Websites -- their

1 customers' Websites to operate. So you have to look at the
2 malicious activity and you have to have a representative
3 sample of the non-malicious activity, the benign activity, to
4 compare the two.

5 THE COURT: All right. So, Ms. Arena, does your
6 expert agree with this stuff?

7 MS. ARENA: So, everything he just said relates to
8 our cyber attacking claim, which is one of four different
9 claims in this case at issue which we're trying to get
10 discovery on. So, my expert agrees that for the cyber
11 attacking claim the experts have to at some point come
12 together and discuss malicious traffic versus non-malicious
13 traffic. However, if RWS's IPs are searched in the system and
14 we see that those IPs are going boom, boom, boom, boom every
15 second for 48 hours, I think we can all say, okay, this looks
16 malicious, this doesn't look like normal Internet activity.

17 Now, because I don't have the IPs, they haven't
18 given us IPs, I don't know. But, no, we wouldn't need to go
19 through all of these hoops at all depending on what the search
20 results were.

21 THE COURT: How about a sample? How about a sample?

22 MS. ARENA: It's --

23 THE COURT: How about you all agree on a sample?

24 MR. WAGNER: Your Honor, this is Bill Wagner.

25 THE COURT: A statistically significant sample.

1 MR. WAGNER: Your Honor, that was the agreement at
2 the -- during the experts' discussion. Mr. Tuten, Kevin
3 Tuten, who is HomeSource's expert, was going to go back to
4 HomeSource and see whether they could narrow down their data
5 to produce these two samples and do so in a manner that they
6 could have a chain of custody to prove that it was an
7 authentic set. We --

8 MS. ARENA: Well, --

9 MR. WAGNER: And when we had the conference, our
10 expert said, you know, it's just data. We can run an
11 algorithm, we can pull out the IP addresses, we can then
12 compare the IP addresses to RWS addresses. It's simple stuff.
13 Just like you said, it can be done in an afternoon.

14 We were hoping that Mr. Tuten -- we would have a
15 follow-up call on the call 15th -- the expert meeting was on
16 the 14th. We were hoping for a call on the 15th to say, yes,
17 we can get these two sample datas or we'll have an -- or no we
18 can't and let's figure out what's next.

19 But our expert believes that --

20 MS. ARENA: May I -- may I --

21 MR. WAGNER: -- they can -- they can narrow the --
22 the data down and run the algorithm in a day.

23 THE COURT: All right. Ms. Arena?

24 MS. ARENA: Yes. So, I think that what they wanted
25 to do is only run the RWS IPs against the sample. So, our --

1 the DDoS attack sample. And we're not just interested in only
2 the DDoS. We're also interested in everything else RWS may
3 have done in the system. So we want to run the RWS IPs
4 against the entire data set, which --

5 THE COURT: Yes, but that may be the end game, but I
6 think at this stage you have to show some significance to it.
7 Because what I'm hearing is, I mean, this is -- so, you have
8 to have proportionality. That's what I'm hearing. There's a
9 big proportionality issue with this. One of the ways to
10 address proportionality is by do sample sizes -- a sampling.

11 MS. ARENA: So, just to step back for a second. If
12 RWS lied and said they were a HomeSource customer and claimed a
13 HomeSource username and password as a customer without
14 authorization and was logging into our system from their
15 offices, that's legally actionable, that falls within the
16 scope of our complaint, that would not show up in the sample.
17 Why can't we have discovery to know if they did that or not?

18 THE COURT: Because it does not seem proportional
19 given the breadth and scope of what's at issue here. I'm not
20 saying you don't get it eventually, but I think you have to
21 make a showing that such a thing happened.

22 MS. ARENA: Well, they already admitted that they --
23 that their sales employee called and used a fake identity
24 asking for access to the HomeSource system.

25 THE COURT: How many sales people did that?

1 MS. ARENA: Well, we have a voice recording of one
2 that we've produced to them in this litigation and they've
3 acknowledged he used a fake name and identity.

4 THE COURT: That's (indiscernible) --

5 MR. WAGNER: (Indiscernible) --

6 THE COURT: -- the voice?

7 MS. ARENA: That's what?

8 THE COURT: That doesn't answer my question at all.
9 Unless you're telling me it's only one. And I wasn't only
10 asking that question of you, I was asking them, because you
11 said -- prefaced that statement by they have already admitted.

12 So my question mainly is to Mr. Wagner. How many
13 salespeople have engaged in this behavior? If you don't know,
14 say you don't know. I'm not looking for an explanation. Yes,
15 no, or I don't know. Those are the only three answers I want
16 to hear.

17 MR. WAGNER: My answer is I don't know. I believe
18 that Alexis is correct that one -- there was one employee that
19 said he posed as a potential customer. I have not heard of
20 anyone posing as an actual customer and using access.

21 But be that as it may, the issue really goes back to
22 attorneys' eyes only. If their -- if we disclose our list of
23 IP addresses to their expert, their expert could use it for
24 discovery, but, you know, that -- we do not want our IP
25 addresses being disclosed to RWS [sic], their employees --

1 THE COURT: And that's the short answer, isn't it,
2 Ms. Arena? For now?

3 MS. ARENA: Yes, but I think they can just change
4 their IP addresses tomorrow and then there's no issue. I
5 think HomeSource is entitled to know what they did in their
6 system.

7 THE COURT: I'm confused by that. I don't -- not
8 confused. I don't understand that.

9 MS. ARENA: So, all we want to do is see what RWS
10 did on HomeSource's Websites in the past. And that's all --

11 THE COURT: Right.

12 MS. ARENA: -- that the IP addresses would tell us.
13 So, all they -- all RWS is producing is -- it's not a warehouse
14 of data, it's just a list of IPs.

15 THE COURT: Right.

16 MS. ARENA: That's all that we're getting from them.
17 And all -- we could have some low-level HomeSource employee
18 search the warehouse of documents and say, well -- with the
19 experts there -- this is where RWS's IPs came up, this is what
20 they did in the system in the past. And then RWS could change
21 all of its IPs going forward very easily.

22 THE COURT: So what? So what? I'm confused.
23 Because I can't deal with future, perhaps, if that happens.
24 Right? We're talking about discovery based on allegations in
25 a complaint that has already been filed.

1 So tell me why, if they go tomorrow and take -- if
2 they go tomorrow and change IP addresses how that hinders the
3 complaint in some way.

4 MS. ARENA: It doesn't. I think -- my point is that
5 he's arguing that we cannot have the IPs, because we could use
6 them nefariously in the future.

7 THE COURT: Okay.

8 MS. ARENA: And my response is they're not AEO, he
9 could just change them. There's nothing prevent --

10 THE COURT: But, no, they're going to be AEO,
11 because I can't resolve this in any other way that makes sense
12 to me. The only way we move this forward now, rather than
13 waste an incredible amount of additional time, is designate
14 this information as attorneys' eyes only through the experts.
15 Through the experts. Right?

16 So, inherently, obvious -- well, obvious to me
17 anyway. Sometimes things aren't so obvious to everybody. But
18 obvious to me, is that the experts really have to be engaged
19 in this data search, for lack of a better word for me.

20 MS. ARENA: Okay. I -- I mean, I have to -- I have
21 to respond to that, because we can't -- first of all, I hope
22 that you're not saying we're going to give them the warehouse
23 of data, because then I've got to deal with am I violating all
24 these privacy agreements with third parties.

25 THE COURT: Tell, me how the -- excuse me. You're

1 going to get IP addresses from RWS.

2 MS. ARENA: Right. A list.

3 THE COURT: A list. RWS's expert shows up wherever
4 with HomeSource's expert.

5 MS. ARENA: Right.

6 THE COURT: The two of them run this match, whatever
7 it is, --

8 MS. ARENA: Right.

9 THE COURT: -- and then out comes data hits.

10 MS. ARENA: Yes.

11 THE COURT: This is really what we're after.

12 MS. ARENA: Yes.

13 THE COURT: Whatever those data hits are is
14 ultimately the information you want, that for now will be
15 attorneys' eyes only.

16 MS. ARENA: Yes. So, if they're --

17 THE COURT: Right?

18 MS. ARENA: -- not going to take --

19 THE COURT: The RWS expert and the HomeSource expert
20 will not disclose this information to anyone.

21 MS. ARENA: So, then they search the RWS IPs,
22 there's going to be a record of that in the system that
23 HomeSource can see.

24 THE COURT: How is HomeSource going to see it if its
25 expert doesn't tell them?

1 MS. ARENA: Because it's their data. So, when they
2 search for it --

3 THE COURT: Oh, yes, HomeSource can see. Yeah, but
4 how is --

5 MS. ARENA: HomeSource.

6 THE COURT: -- RWS going to know?

7 MS. ARENA: RWS won't know and I -- and I don't
8 think we should give them the logs. I think we should do it
9 exactly as you're describing right now. That -- that we --
10 basically, it's akin to when the client has a warehouse of
11 paper and the opposing party gets the right of inspection and
12 you bring the opposing party over and experts are there and
13 you say, hey, look through my warehouse --

14 THE COURT: Right.

15 MS. ARENA: -- and review that, and then they go
16 home.

17 THE COURT: Okay.

18 MS. ARENA: But RWS doesn't want that. Right?

19 MR. WAGNER: Your Honor, Bill Wagner again. The
20 hiccup seems to be that HomeSource's counsel wants the
21 inspection to occur on a HomeSource computer. And this is the
22 same laptop that they were going to bring to their office with
23 the IP logs. We don't want --

24 THE COURT: Well, computer data -- I'm sorry. I'm
25 sorry. I just had this thought and I apologize I'm cutting

1 you off.

2 Is there a way to mirror image, and that way it's
3 not -- HomeSource won't be able to see?

4 (Extended pause)

5 THE COURT: So, if the expert takes a mirror image
6 of all this data, --

7 MS. ARENA: Mm-hmm.

8 THE COURT: -- downloads it onto a laptop, --

9 MS. ARENA: Mm-hmm.

10 THE COURT: -- that expert brings that laptop with
11 the mirror image of the data, RWS's expert brings its stuff
12 with a mirror image of its data, they then run the algorithms,
13 whatever the tech they are, and the matches come out or not.
14 Right? The matches are the matches. So, the algorithm --
15 assuming there are matches. Maybe there aren't any. Right?

16 MS. ARENA: Mm-hmm.

17 THE COURT: But any overlapping information will be
18 identified as a result of that. So, you're not on the
19 HomeSource mainframe or whatever they call that now, and
20 you're not on the RWS mainframe, whatever they call that now,
21 you're actually running the data against mirror images.

22 MS. ARENA: I can see if that can be done. I can --

23 THE COURT: You have an expert on the phone. Ask
24 the expert on the phone. Ms. Bayuk?

25 MS. BAYUK: Yes, yes. Of course that can be done.

1 MS. ARENA: The only -- so, I'm sorry, just to
2 clarify it. So Your Honor is not proposing that they're going
3 to take home our data. They're not going to take home our
4 warehouse.

5 THE COURT: Nobody is taking home anything. The
6 experts will -- one expert will come with the mirror image of
7 this -- all right. Let me be more specific because we are on
8 the record.

9 RWS's expert will show up somewhere of your choosing
10 with a laptop that contains a mirror image of all the IP
11 addresses of RWS. HomeSource's expert is going to show up,
12 same place, same time, same church, same pew, with a laptop
13 with a mirror image of all of HomeSource's data. The experts
14 will then -- I assume in the same room. And when I say same
15 room, I'm not talking physically; right? Will then run the
16 algorithms to see if there are matches between IP addresses
17 from RWS and the IP addresses HomeSource is concerned about,
18 look for hacking and improper access. Those algorithms run,
19 and all things being equal, the equation ends with these are
20 the matches.

21 (Extended pause)

22 THE COURT: Two individuals will have that on their
23 laptops. It will be subject to attorneys' eyes only. For
24 everybody. And the resultant search will also be subject to
25 attorneys' eyes only.

1 MS. ARENA: So, Your Honor, I -- just to clarify.
2 You're proposing that RWS's expert get all of our data on the
3 laptop or just see it? Just inspect it. Is it an inspection
4 or is it to get it, receive it as for production?

5 THE COURT: You're the one telling me it's a 500
6 block radius of --

7 MS. ARENA: Right. I know.

8 THE COURT: How is -- how is that going to happen?
9 You know he has to see it. But this is an expert, not an
10 employee of RWS, who you all have to engage in a process where
11 they don't share the information. The ultimate information.
12 They come out -- the two experts have to come up with a way to
13 do this. There is no other way. There's no other way.

14 But it's a mirror image. Right? Then you're not
15 accessing at the same time the warehouse. You've actually
16 taken a photograph of the warehouse.

17 MS. ARENA: I just want to clarify that their expert
18 isn't keeping the photograph of the warehouse.

19 THE COURT: No, but -- all right. And -- and then
20 now we're talking mission impossible and the laptops explode
21 when this is done. I don't know -- I don't know how that
22 happens. But after they're done, the proprietary information
23 of both parties, RWS and HomeSource, is now no longer
24 available and the experts have to assure each other that their
25 own client's information is no longer available to the other

1 side.

2 MS. BAYUK: This is Jennifer Bayuk. I am confident
3 that Kevin Tuten, the HomeSource expert, and I can come up
4 with a procedure that we could in advance lay out that would
5 satisfy those requirements.

6 THE COURT: Thank you. It takes some time and takes
7 some thinking. I know you can do this. And this is from a
8 criminal aspect -- side of work that I do. That's why I know
9 it can be done.

10 (Extended pause)

11 THE COURT: There's your charge. I'm done.

12 Protocols to be identified and come to by the
13 experts and signed off by the parties prior to the search.

14 Have a good day.

15 MR. WAGNER: Thank you, Judge.

16 MS. ARENA: Thank you.

17 MR. LIPMAN: Thank you, Judge.

18 (Conference adjourned at 11:48 a.m.)

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